No. 91-718

IN THE

Supreme Court of the United States

October Term, 1991

LILLIE A. HARRISON

Petitioner

versus

DOW CHEMICAL COMPANY

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Franklin Press, Inc. • Baton Rouge, Louisiana

QUESTIONS PRESENTED

1. Whether summary judgment was properly entered against the petitioner based upon the failure of counsel to file an opposition to respondent's motion for summary judgment.

2. Whether a court of appeals may consider evidence not presented to the district court when reviewing the judgment on appeal.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

LILLIE A. HARRISON

Petitioner

versus

DOW CHEMICAL COMPANY

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS AND REPORTS

The opinion of the Court of Appeals for the Fifth Circuit has not been reported and is reprinted in the Appendix hereto. The Magistrate's reports and opinions ("order") of the U.S. District Court have not been reported and are also reprinted in the Appendix hereto.

JURISDICTIONAL STATEMENT

The judgment of the U.S. Court of Appeals for the Fifth Circuit was entered on August 1, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) et seq.

Summary Judgment, Federal Rules of Civil Procedure 56.

STATEMENT OF THE CASE

Petitioner, Lillie A. Harrison, instituted this suit on September 21, 1989, through her attorney, Robert F. Monahan, against the respondent, Dow Chemical Company (hereinafter referred to as Dow), based on race discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e), et seq. Subsequent to filing its answer on October 17, 1989, and its amended answer on August 10, 1990, Dow, on August 22, 1990, filed a Motion for Partial Summary Judgment to dismiss Ms. Harrison's pendent state claim and her claim for compensatory damages. This motion was unopposed by Ms. Harrison's attorney. Dow then moved for summary judgment on Ms. Harrison's Title VII claim as well. Although Ms. Harrison's attorney filed for and received an extension of time to file an opposition to Dow's motion, he nevertheless allowed the motion to proceed unopposed.

On October 16, 1990, Magistrate Stephen C. Riedlinger recommended the granting of Dow's motion for partial summary judgment which was adopted by United States District Court Judge Frank Polozola on November 21, 1990. Subsequently, on Novem-

ber 30, 1990, Magistrate Riedlinger granted Dow's motion for summary judgment which again was adopted by Judge Polozola on January 8, 1991, dismissing Ms. Harrison's suit with prejudice.

Upon Ms. Harrison learning that both of Dow's motions were unopposed, she sent a letter to Judge Polozola which was received by the court on January 16, 1991 (Appendix F), requesting that the case be "reopened" based upon the need to have her evidence in opposition considered. Since the court did not respond to Ms. Harrison's letter, a notice of appeal to the Fifth Circuit Court of Appeals from the judgment of the Middle District of Louisiana was filed pro se (Appendix E). Subsequent to filing the notice of appeal, Ms. Harrison received a letter from Judge Polozola on February 14, 1991, explaining that because she had filed a notice of appeal, his court no longer had jurisdiction in the case (Appendix D).

On appeal, Ms. Harrison's new attorney sought to have the case remanded based upon the introduction of the evidence not presented to the trial court for consideration in opposition to Dow's motions for summary judgment. The evidence presented to the Court of Appeals sought to prove that not only were genuine issues of material facts present in the case, but that injustice would otherwise result if the judgment was entered based on Dow's motions being unopposed. However, on August 1, 1991, the United States Court of Appeals affirmed the decision of the Middle District of Louisiana citing two Fifth Circuit cases, *Garcia v. American Marine Corp.*, 432 F.2d 6, 8 (1970) and *Munoz v. Int'l. Alliance of Theatrical Stage Employees*, 563 F.2d 205, 209 (1977). The court stated that it could not consider any of her evidence brought to light for the first time on appeal, *Garcia*, supra, and that the materials not presented to the district court to oppose summary judgment are *never* properly before the reviewing court on appeal, *Munoz*, supra, (emphasis added).

ARGUMENT

Summary judgment is only proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); See *McCrae v. Hankins*, 720 F.2d 863, 865 (5th Cir. 1983). This Court, in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), further explained Fed. R. Civ. P. 56 in that a party defending against a motion for summary judgment must establish the existence of elements essential to his case which he has the burden to prove at trial. If there is "a complete failure of proof concerning an essential element of the nonmoving party's case," then summary judgment is entitled to the moving party as a matter of law. *Celotex* at 322, 323. Although it is risky for a nonmoving party to fail to present evidence in response to the moving party's motion, failure to do so does not automatically mandate granting a motion for summary judgment. *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985). Therefore, a motion for summary judgment cannot be granted simply because there is no opposition filed to the motion. *Hibernia National Bank v. Administrative Cent. Soc. Anonima*, 776 F.2d 1277 (5th Cir. 1985). Furthermore, if granting the Motion for Summary Judgment was therefore based on thhe failure to respond to the motion, then reversible error was committed. *Hibernia Nat'l. Bank*, Id.

In the case at bar, the magistrate states six times in his two reports that the petitioner failed to come forward with any evidence to show that there was a genuine issue of material fact, besides outlining in the first paragraph of each report that the respondent's motion was unopposed. Also, the opinion adopting the Magistrate's report by the United States District Judge begins by stating that no objection was filed. However, if the Magistrate, or the

Judge, had examined the depositions and exhibits that were part of the record for the petitioner, then the respondent's motion could have been defeated. Therefore, just because the motion was unopposed, at no fault of the petitioner, it does not mean that there was *a complete failure of proof* concerning essential elements of the petitioner's case (emphasis added).

Upon the petitioner becoming aware that the respondent's motions were unopposed, she wrote a letter to the Federal District Court Judge. Although the language of the letter was in layman's terms, it is clear that she sought a rehearing so as to present her evidence in opposition. Such a request was also timely. However, the District Court did not act on her request and for fear of not being able to timely request an appeal, she did so pro se. Then, after giving notice that an appeal would be filed, the District Court responded to her letter by stating that since she had given notice of appeal, the District Court no longer had jurisdiction in her case.

In the petitioner's appeal to the United States Court of Appeals for the Fifth Circuit, the new attorney for petitioner sought to have the case remanded based on the evidence which was in the record but presented for the first time in the Court of Appeals. In its opinion, the Court of Appeals stated it could not "consider any of her evidence brought to light for the first time on appeal," *Garcia v. American Marine Corp.*, 432 F.2d 6, 8 (5th Cir. 1970), and that "materials not presented to the district court for consideration of a motion for summary judgment *are never properly before the reviewing court on appeal,*" quoting *Munoz v. Int'l. Alliance of Theatrical Stage Employees*, 563 F.2d 205, 209 (5th Cir. 1977) (emphasis added).

Although it is not the job of the Court of Appeals to examine evidence presented for the first time to find issues of fact, the court should remand the case to the district court to conduct further

hearings to include the evidence. See *Tirado v. Bowen*, 842 F.2d 595 (2nd Cir. 1988). *In re AOV Industries, Inc. et al*, 797 F.2d 1004 (D.C. Cir. 1986). Further, this Court has left the decision to the discretion of the Court of Appeals to make exceptions for such evidence when injustice might otherwise result." *Powell v. U.S. Bureau of Prisons*, 927 F.2d 1239 (D.C. Cir. 1991). *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877 (1976). See *Proctor v. State Farm Mutual Automobile Ins. Co.*, 675 F.2d 308, 326 (D.C. Cir.) cert. denied, 459 U.S. 839, 103 S.Ct. 86, 74 L.Ed. 2d 81 (1982), see also *U.S. of America v. Bailey, et al*, 585 F.2d 1087 (D.C. Cir.) rehearing denied (1978). By taking these authorities into consideration, it is clear that the Fifth Circuit is in conflict with the decisions of this Court and courts of other districts.

CONCLUSION

The petitioner submits to this Court that had the District Court acted upon petitioner's letter and granted a rehearing, injustice would not have resulted and this Court would not be called upon to decide these issues. However, this was not the case. This suit is based on race discrimination. Certainly this is a matter with far reaching consequences in which the outcome may affect countless others, not this petitioner alone. Not only would a grave injustice be done to this petitioner by the harsh application of the rule in the Fifth Circuit, in that it never considers evidence presented for the first time in its court, but, injustice will also be done to those who come after her. Therefore, for all the foregoing reasons, the petitioner prays that this Court grant this Petition for Writ of Certiorari, and further, to remand this case for a full hearing which includes all the evidence in the record to prevent injustice.

Respectfully submitted,

Dan M. Scheuermann
Counsel for Petitioner
405 St. Ferdinand St.
Baton Rouge, LA 70802
Telephone: (504) 387-1221

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent to a counsel of record by placing three copies in the United States mail, properly addressed, postage prepaid this 29th day of October, 1991, Baton Rouge, Louisiana.

Dan M. Scheuermann

APPENDICES

APPENDIX A

In the United States Court of Appeals
For the Fifth Circuit

No. 91-3126
Summary Calendar

LILLIE A. HARRISON **Plaintiff-Appellant,**

versus

DOW CHEMICAL COMPANY **Defendant-Appellee.**

Appeal from the United States District Court for the
Middle District of Louisiana
(CA-89-711-B-MI)
(August 1, 1991)

Before CLARK, Chief Judge, KING and GARWOOD, Circuit Judges.

PER CURIAM:*

Lillie Harrison filed a Title VII action against her employer, Dow Chemical Company (Dow), also alleging a pendent state claim for intentional infliction of emotional distress. The district court granted Dow's initial motion for partial summary judgment, and its later motion for summary judgment on the entire case.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Harrison filed no opposition. On appeal, Harrison argues that her counsel's ineffective assistance caused her action to be dismissed. She presents an exhibit book she believes to establish facts that are material and at issue. Harrison concedes that her attorney failed to file any evidence with the district court in opposition to Dow's summary judgment motions, and that none of the evidence recounted in her appellate brief was presented to the district court. We cannot consider any of her evidence brought to light for the first time on appeal. *Garcia v. American Marine Corp.*, 432 F.2d 6, 8 (5th Cir. 1970). "Materials not presented to the district court for consideration of a motion for summary judgment are never properly before the reviewing court on appeal from the judgment granting the motion." *Munoz v. Int'l. Alliance of Theatrical Stage Employees*, 563 F.2d 205, 209 (5th Cir. 1977).

That her counsel might have been deficient provides no ground for relief, for civil litigants have no sixth amendment right to effective assistance of counsel. *Sanchez v. United States Postal Service*, 785 F.2d 1236, 1237 (5th Cir. 1986). If her attorney did mishandle this matter, Harrison may have a remedy against her attorney in the form of a malpractice action. *Id.* That action would remain distinct from the matters before the district court and this court. Harrison's concessions establish that summary judgment was properly entered. She is entitled to no relief in this proceeding. *Id.*

AFFIRMED. *See* Local Rule 47.6.

APPENDIX B

United States District Court
Middle District of Louisiana

Civil Action
No. 89-711-B

LILLIE A. HARRISON
versus
DOW CHEMICAL COMPANY

AMENDED OPINION

For reasons set forth in the Magistrate's Report to which *no* objection was filed:

IT IS ORDERED that Dow Chemical Corporation's motion for summary judgment be GRANTED and this suit be dismissed. Judgment shall be entered accordingly.

Baton Rouge, Louisiana, January 7, 1991.

/s/ Judge Frank J. Polozola
United States District Judge

APPENDIX C

United States District Court
Middle District of Louisiana

Civil Action
No. 89-711-B

LILLIE A. HARRISON
versus
DOW CHEMICAL COMPANY

MAGISTRATE'S REPORT

This matter is before the court on a motion for partial summary judgment and to dismiss plaintiff's pendent state law claim and claim for compensatory damages. The motion is unopposed.

Plaintiff, Lillie A. Harrison, hired by the defendant, Dow Chemical Company (Dow) in 1971, filed this action pursuant to Title VII alleging that she was denied promotions and received smaller merit increases because of her race, black. Plaintiff also asserted a pendent state law claim for intentional infliction of mental distress, in addition to equitable relief and attorney's fees, requested compensatory damages. Defendant's contention in its motion for partial summary judgment was essentially that there was no basis in law for the plaintiff's alleged cause of action under state law or her claim for compensatory damages. Defendant based

the motion to dismiss the state law cause of action and claim for damages on two grounds: (1) prescription, and (2) failure to state a claim upon which relief can be granted.

Summary judgment is only proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ. P. 56(c). The party seeking summary judgment always bears the initial responsibility of identifying for the court those portions of the record, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 242, 106 S.Ct. 2548, 2553 (1986). Rule 56(e) requires the nonmoving party to go beyond the pleadings and by his own affidavits, or by depositions, answers to interrogatories and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Celotex, supra*. With regard to materiality, only those disputes over facts that might affect the outcome of the lawsuit under the governing substantive law will preclude summary judgment.

Prescription

Defendant argued that the plaintiff's claim under Louisiana Civil Code Article 2315 for intentional infliction of emotional distress was prescribed under Louisiana Civil Code Article 3492.[1] Article 3492 provides that delictual actions are subject to a liberative prescription of one year which commences from the day injury or damage is sustained.[2] The allegations of the plaintiff's complaint and her deposition testimony indicated that the plaintiff was aware of the facts giving rise to her complaint at the time of job performance reviews in 1987 and March of 1988. Plaintiff's depo.

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[1] Defendant attached to its motion plaintiff's response to interrogatory number 3 in which plaintiff stated that her alleged state law claim was for intentional infliction of emotional distress under Louisiana Civil Code Article 2315.

[2] See, *Clofer v. Celotex Corp.*, 528 So.2d 1074 (La. App. 5th 1988); *Waltman v. International Paper Co.*, 875 F.2d 468, 477 (5th Cir. 1989).

p. 196. Furthermore, the plaintiff filed her EEOC charge July 14, 1988. Plaintiff's depo. p. 201. Accepting July 14, 1988 as the latest date when prescription began to run, the plaintiff's claim would have been over a year old at the time she filed suit on September 21, 1989. Moreover, the plaintiff failed to designate any facts in the record to show that there is a genuine issue of material fact as to whether or not her state law cause of action has prescribed.

Plaintiff also alleged in her complaint that from December, 1986 to the present she has received smaller merit percentage pay increases than white secretarial employees. In the case of a continuous violation, state law recognizes an equitable exception to the one year prescriptive period. Where the cause of injury is a continuous one giving rise to successive damages, prescription dates from the cessation of the wrongful conduct causing the damage. *See, South Central Bell Telephone v. Texaco, Inc.*, 418 So.2d 531, 533 (La. 1982); *Waltman, supra*. However, this is a motion for summary judgment and the plaintiff again failed to come forward with any evidence to support her allegation of continuing discrimination in pay increases. Thus, the record does not support any continuing tort based on intentional infliction of emotional distress due to discrimination in pay, and the plaintiff has failed to demonstrate that there exists a genuine issue for trial regarding the existence of a continuing violation.

Failure to State a Claim

Even assuming that the plaintiff's claim has not prescribed, under Louisiana law the plaintiff has failed to allege or support a claim for intentional infliction of emotional distress. Such a claim requires allegations that the defendant acted intentionally, to embarrass and humiliate the plaintiff in a manner which was outrageous and beyond the privileged bounds of insisting on one's legal rights. *Steadman v. South Central Bell Telephone Co.*, 362 So.2d 1144, 1146 (La.App. 2d Cir. 1978); *Marshall v. Circle K Corp.*, 715 F.Supp. 1341 (M.D. La. 1989). Plaintiff did not allege in her complaint facts or circumstances from which it could be

inferred that the defendant acted in an outrageous or extreme manner. The complaint did not include any facts that would give rise to such an action in tort, and the plaintiff's deposition testimony also did not reveal any facts that would suggest or support a claim of intentional infliction of emotional distress. Plaintiff's depo. pp. 196, 201, 209-10.

In summary, defendant has demonstrated the absence of any genuine issue of material fact on these issues and the plaintiff has failed under the requirement of Rule 56(e) to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. Accordingly, summary judgment should be granted as to the plaintiff's state law claim for intentional infliction of emotional distress.

Claim for Compensatory Damages

Plaintiff requested compensatory damages in her complaint. The court has determined that summary judgment should be granted as to the plaintiff's alleged state law tort claim. If the district court adopts this recommendation then only plaintiff's Title VII claim remains, therefore the plaintiff's request for compensatory damages should also be dismissed. It is well established that under Title VII only equitable relief is available. *Bennett v. Corroon & Black Corp.*, 845 F.2d 104 (5th Cir. 1988); *Hampton v. I.R.S.*, 1990 U.S. App. Lexis 16960 (5th Cir. 1990).

RECOMMENDATION

It is the recommendation of the magistrate that the defendant's motion for partial summary judgment be granted dismissing the plaintiff's pendent state claim and claim for compensatory damages.

Baton Rouge, Louisiana, October 15, 1990.

/s/Stephen O. Riedlinger
United States Magistrate

APPENDIX D

United States District Court
Middle District of Louisiana
Baton Rouge, La. 70801

Chambers of
Frank J. Polozola
Judge

February 14, 1991

Ms. Lillie A. Harrison
3471 Lukeville Lane
Brusly, Louisiana 70719

Re: Lillie A. Harrison
v. Dow Chemical Co.
Civil Action 89-711-B

Dear Ms. Harrison:

Because you have taken an appeal, the Court no longer has jurisdiction in this case.

/s/Frank J. Polozola
United States District Judge

APPENDIX E

United States District Court for the
Middle District of Louisiana

Civil Action No. 89-711-B
Notice of Appeal

LILLIE A. HARRISON
versus
DOW CHEMICAL COMPANY

Notice of Appeal to the
Fifth Circuit Court of Appeals
from the Judgment of the Middle District of Louisiana

Notice is hereby given that LILLIE A. HARRISON, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 3rd day of January, 1991.

RESPECTFULLY SUBMITTED,

/s/Lillie A. Harrison
In Proper Person
3471 Lukeville Street
Brusly, Louisiana 70719

APPENDIX F

January 14, 1991

Judge Frank J. Polozola
United States District Court
Middle District of Louisiana
113 U.S. Court House
707 Florida Blvd.
Baton Rouge, LA 70801

RE: LILLIE A. HARRISON VS.
DOW CHEMICAL COMPANY
CIVIL ACTION NO. 89-711-B

Dear Sir:

This letter comes as a request to have the above mentioned case re-opened on the following basis:

1. The plaintiff attorney of record, Mr. Robert Felton Monahan failed to file several crucial documents in connection with this case. These documents are listed below:
   a. Opposition to the Defendant's Motion for Summary Judgement after he asked the court for a five day extension to file the objection or opposition.
   b. Objection to Magistrate Stephen Riedlinger's Report dated October 15, 1990.
   c. Objections to Judge Frank Polozola's Opinion dated November 21, 1990.

I sincerely believe that the filing of these documents were relevant to the Judgement rendered in this case.

2. The plaintiff attorney of record, Mr. Robert Felton Monahan was unavailable for meetings scheduled by his office with the plaintiff on the following dates.

   a. January 2, 1991 at 4:30 p.m., Mr. Monahan's secretary said he was out of town and would not return until Friday, January 4, 1991. On the day of his return I tried contacting him by phone and once again he was unavailable.

   b. January 8, 1991 at 4:30 p.m., Mr. Monahan's secretary called to cancel the scheduled appointment because he was supposedly out of town and/or unavailable to meet.

   c. January 11, 1991 at 4:30 p.m. Mr. Monahan was once again out of town and could not be reached for verbal conversation with me. However, upon my arrival to his office the secretary presented me with an envelope containing several documents. One of those documents was an unsigned letter of resignation. (Attachment 1). This was the very first time feelings were expressed that I did not have a viable Title 7 cause of action. This letter was given to me three days prior to the scheduled trial dates of January 14-15, 1991, and eight days after the Judgment was rendered by the Judge on January 3, 1991. Because of this drastically late correspondence, I only have 21 days to file an appeal to the Judgment rendered and not the normal 30 days established by law.

In my opinion, and I hope you agree that this was a very unethical, unprofessional and rude manner in which Mr. Monahan handled this case. As a result, I have requested that Mr. Robert Felton Monahan file a motion with the court to withdraw from this case so that I may be afforded the opportunity to seek a new counselor to re-open the case at the court's permission to develop it in the manner that it should have been done in the first place. (Attachment 2).

Judge Polozola, as you can plainly see, I am at the mercy of the court. I humbly ask you to give me the opportunity to have my case heard and my day in court.

Humbly submitted,

Lillie A. Harrison
3471 Lukeville Lane
Brusly, LA 70719

Attachments (2)

(2)

No. 91-718

In The

Supreme Court of the United States

October Term, 1991

LILLIE A. HARRISON,

Petitioner,

v.

DOW CHEMICAL COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT, DOW CHEMICAL COMPANY

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December 20, 1991

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a defendant is entitled to summary judgment where the plaintiff fails to offer any evidence to contradict the undisputed proof that essential elements of the plaintiff's claims are insupportable.

2. Whether an appellate court, in reviewing a grant of summary judgment, is required to consider evidence which was never presented to the district court and was, therefore, not part of the record on appeal.

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October Term, 1991

LILLIE A. HARRISON,

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v.

DOW CHEMICAL COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT, DOW CHEMICAL COMPANY

STATEMENT OF THE CASE

In the action below, Harrison alleged that Dow Chemical Company discriminated against her on the basis of her race in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq.[1]

[1] Pursuant to Supreme Court Rule 29.1, Appendix A lists the parent company and nonwholly owned subsidiaries of Dow.

Harrison also alleged that the same allegations of discrimination gave rise to an independent claim of intentional infliction of emotional distress under Louisiana law.

After nearly a year of discovery, Dow filed a motion for partial summary judgment requesting dismissal of her pendent state law claim and her claim for emotional distress damages on the grounds that (1) her claim for intentional infliction of emotional distress was untimely under Louisiana law; (2) she failed to state a claim for intentional infliction of emotional distress under Louisiana law; and (3) compensatory damages were not recoverable under Title VII. Along with the motion, Dow filed a statement of undisputed facts as required by the local rules of the district court. (Appendix B)

Shortly thereafter, Dow moved for summary judgment on Harrison's Title VII claim as well. This motion was based on the grounds that (1) most of Harrison's claims of discrimination arose more than 180 days before she filed her charge of discrimination with the Equal Employment Opportunity Commission and were, therefore, untimely; (2) there was no evidence with which she could establish a prima facie case of race discrimination; and (3) Harrison could not ultimately prevail on her claim of discrimination because Dow offered competent summary judgment proof demonstrating that its actions were based on legitimate nondiscriminatory reasons, and Harrison admitted having no evidence to prove that those reasons were pretextual. Again, Dow filed a statement of undisputed material facts as required by the local rules of the district court. (Appendix C)

Significantly, 21 of the 23 separately listed undisputed facts filed with Dow's motions were taken directly from admissions made by Harrison in her deposition and in response to Dow's interrogatories. Of the two remaining undisputed facts, one was simply the date on which Harrison filed her complaint. The final undisputed fact was based on affidavit testimony of the Dow supervisor who made the employment decisions which were being questioned, and Harrison admitted she had no evidence to rebut that testimony.

Harrison failed to file any response to either of Dow's motions. She additionally failed to file any summary judgment evidence to rebut the evidence supporting Dow's motions.

On October 15, 1990, the United States magistrate issued a report to the district court recommending that Dow's motion for partial summary judgment be granted. Pursuant to 28 U.S.C. §636, the magistrate notified Harrison that she had ten days within which to file written objections to the findings of fact and conclusions of law contained in the report. However, Harrison filed no objections to the magistrate's report and recommendation. On November 21, 1990, the district court adopted the report and dismissed Harrison's claim for intentional infliction of emotional distress.

On November 30, 1990, the magistrate issued a second report recommending that the district court grant Dow's motion for summary judgment on Harrison's Title VII claims as well. The magistrate again advised Harrison that she had ten days to file written objections to the

report. However, she filed no objections to this report and recommendation either.

In January 1991, the district court adopted the magistrate's report, dismissed the suit in its entirety, and entered final judgment in favor of Dow.

Harrison subsequently appealed the final judgment to the United States Court of Appeals for the Fifth Circuit. Harrison conceded that her appeal was based solely upon evidence which was not in the record on appeal and arguments which were never presented to the district court. She argued simply that the appeals court should consider evidence outside the record. She further argued that the summary judgment should be reversed because she was not adequately represented in the district court. The court of appeals, in an unpublished per curiam opinion, rejected both arguments holding that it would not consider Harrison's evidence offered for the first time on appeal, and that alleged ineffective assistance of counsel, although perhaps grounds for a malpractice action, did not constitute grounds for reversing the summary judgment.

SUMMARY OF ARGUMENTS FOR DENYING WRIT

1. This Court has already set forth detailed guidelines for evaluating summary judgment motions in cases such as this where the nonmovant would have the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986). In the present case, the district court properly applied these guidelines in ruling

on Dow's summary judgment motions. The district court placed the burden of proof on Dow, carefully evaluated the summary judgment evidence offered by Dow (most of which were Harrison's own admissions), and carefully analyzed how the summary judgment evidence precluded Harrison from proving essential elements of her claims. Contrary to Harrison's suggestion in her present petition, the district court did not simply grant Dow's motions because they were unopposed. And since the motions were granted in accordance with this Court's decisions and guidance concerning Rule 56, this case does not warrant the granting of Harrison's petition for writ of certiorari.

2. Harrison also argues that the Fifth Circuit improperly affirmed the summary judgment even though she concedes that her appeal was based entirely upon evidence which was not presented to the district court and, therefore, not part of the record on appeal. The Fifth Circuit's refusal to consider evidence which was never presented to the district court was consistent with its prior rulings and the rulings of all other courts of appeal which have considered the issue. Moreover, the well known *Federal Practice & Procedure* treatise states unequivocally that appellate courts reviewing a grant of summary judgment "can consider only those papers that were before the trial court. The parties cannot add exhibits, depositions, or affidavits to support their position, nor can they advance new theories or raise new issues in order to secure a reversal of the lower court's determination." 10 C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure*: Civil 2d. § 2716 at 650-54 (1983).

This is not only well-settled law, but additionally makes a great deal of sense. A rule which required courts of appeal to consider evidence not offered to the district court, as suggested by Harrison, would essentially give every losing party the opportunity to retry her case on appeal and would create endless litigation. Thus, there are no special and important reasons for reviewing the decision of the Fifth Circuit in this case.

ARGUMENT

Rule 10 of this Court's rules provides that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." There are no special and important reasons justifying this Court's review of the lower courts' decisions in this case. The summary judgment entered by the district court was entirely consistent with the decisions of this Court concerning the evaluation of summary judgment motions under Rule 56 of the Federal Rules of Civil Procedure. The court of appeals then declined to consider the evidence which was never presented to the district court, and affirmed the grant of summary judgment. In doing so, its decision was consistent with both its prior rulings and the rulings from every other federal court of appeals which has considered the issue.

I. Summary Judgment Was Entered in Favor of Dow in This Case Consistent With Rule 56(c) of the Federal Rules of Civil Procedure and This Court's Analysis of That Rule.

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper if there is no

genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. In *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986), this Court set forth the standard for evaluating summary judgment motions in cases such as this where the nonmovant would have the burden of proof at trial:

> [T]he plain language of Rule 56(c) *mandates* the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

477 U.S. at 322-23, 106 S.Ct. at 2552 (emphasis added). *See also, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986). This Court has further held that in order to rebut a properly supported motion for summary judgment, the party opposing the motion must designate specific evidence in the record of sufficient caliber and quantity to create a genuine issue for trial such that a rational finder of fact could return a verdict in his favor. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1356 (1986); *Anderson*, 477 U.S. at 251-55, 106 S.Ct. at 2512-13.

Significantly, Harrison does not contend in her petition to this Court that Dow's motions were not properly supported by competent summary judgment evidence. Nor does she contend that Dow's motions left open for dispute genuine issues of material fact concerning essential elements of her claims. Indeed, Dow's motions for summary judgment were based almost entirely upon Harrison's own admissions made in her deposition and answers to Dow's interrogatories.[2]

Moreover, Harrison does not contend that she was not afforded an adequate amount of time for discovery. Discovery was conducted for nearly a full year, and Harrison's attorney took the depositions of several Dow employees and conducted other forms of discovery.

In her present petition, Harrison attempts to persuade this Court that Dow's motions for summary judgment were granted simply because they were unopposed. She infers that the district court failed to examine the record evidence. Her argument is misleading and wrong.

The magistrate for the district court wrote a five page report concerning Dow's motion for partial summary judgment on Harrison's pendent state law claim, and a seven page report concerning Dow's motion for summary judgment on the Title VII claim. In each report, the magistrate first discussed the applicable law for considering the motions, as set forth by this Court in *Celotex Corp. v.*

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[2] With these admissions and the arguments set forth in Dow's motions for summary judgment, Harrison's attorney in the district court realized that her claims were groundless and advised her accordingly in a letter which Harrison subsequently filed with the district court.

Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986). The reports specified that the party seeking summary judgment bears the initial burden of demonstrating, through proper summary judgment evidence, that there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law. The magistrate then carefully evaluated the summary judgment proof offered by Dow, most of which were Harrison's own admissions. Finally, the magistrate carefully analyzed how the summary judgment evidence precluded Harrison from proving essential elements of her claims and established that Dow was entitled to judgment as a matter of law.[3]

Thus, Harrison's contention that the district court granted summary judgment simply because Dow's motions were unopposed is specious. And since the motions were analyzed in accordance with this Court's decisions and guidance concerning Rule 56, this case hardly warrants the granting of Harrison's petition for writ of certiorari.

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[3] Although Harrison included a copy of the magistrate's report on the motion to dismiss the pendent state law claim, she failed to append to her petition a copy of the magistrate's report on the motion for summary judgment as to the Title VII claim. Thus, Dow has attached the report as Appendix D to this brief.

Harrison also failed to include a copy of the district court's opinion adopting the magistrate's report on the motion for partial summary judgment. This opinion is attached as Appendix E.

II. The Fifth Circuit Was Not Required to Consider Evidence Which Harrison Failed to Present to the District Court and That Was Not Part of the Record on Appeal.

Harrison also argues that the Fifth Circuit erred in refusing to consider evidence which was never offered to the district court. Significantly, in her brief to the court of appeals, she specifically stated that she "concedes that none of the evidence presented in [her] appellate brief was presented in affidavit or memorandum form to oppose Dow's motion for summary judgment."

The Fifth Circuit has long held that in reviewing a grant of summary judgment, an appellate court may only consider evidence which was before the trial court. Parties are not entitled to add exhibits, depositions or affidavits for the court of appeals to consider. Moreover, they cannot advance new theories or raise new issues in order to have the lower court's determination reversed. *Richardson v. Penzoil Producing Co.*, 896 F.2d 919, 921 (5th Cir. 1990); *Munoz v. International Alliance of Theatrical Stage Employees*, 563 F.2d 205, 209 (5th Cir. 1977); *Garcia v. American Marine Corp.*, 432 F.2d 6, 8 (5th Cir. 1970).

Contrary to Harrison's suggestion that the position of the Fifth Circuit conflicts with other courts, nearly all the federal courts of appeal have considered the issue and have uniformly rejected a party's attempt to have a summary judgment reversed based upon evidence that was never presented to the district court. *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1035-36 (DC Cir. 1988) ("[I]t is well established that the obligation of this Court is to look at the record before the District Court at the time it

granted the motion, not at some later point."); *Harkins Amusement Enterprises, Inc. v. General Cinema Corp.*, 850 F.2d 477, 482 (9th Cir. 1988), *cert. denied*, 488 U.S. 1019, 109 S.Ct. 817 (1989) ("[T]his court is limited to consideration of issues of fact presented to the district court."); *Gilson v. Republic of Ireland*, 787 F.2d 655, 659 (D.C. Cir. 1986) ("Materials not presented to the district court for consideration of a motion for summary judgment are never properly before the reviewing court on appeal from the judgment granting the motion." *Quoting Munoz*, 563 F.2d at 209); *Box v. A & P Tea Co.*, 772 F.2d 1372, 1376 (7th Cir. 1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3311 (1986) ("On appeal of a summary judgment, the appellate court can usually consider only those matters that were presented to the trial court."); *In the Matter of Morris Paint & Varnish Co.*, 773 F.2d 130, 134 (7th Cir. 1985) ("In reviewing a lower court's decision to grant summary judgment, an appellate court should consider only the evidence that was before the trial court."); *Voutour v. Vitale*, 761 F.2d 812, 817 (1st Cir. 1985), *cert. denied*, 474 U.S. 1100, 106 S.Ct. 879 (1986) (When a plaintiff challenges a grant of summary judgment, the appellate court's "review is confined to an examination of the materials before the court at the time the rulings were made."); *Sound Ship Building Corp. v. Bethlehem Steel Co. Inc.*, 533 F.2d 96, 101 (3d Cir.), *cert. denied*, 429 U.S. 860, 97 S.Ct. 161 (1976) ("The presence or absence of genuine issues of material fact is to be gaged as of the time judgment was entered by the district court.").

Moreover, the well known treatise on the Federal Rules of Civil Procedure, *Federal Practice and Procedure*, has a section specifically dealing with the nature of

review on appeal from a grant of summary judgment. This treatise states:

> The appellate court is limited in its review in two ways. First, it can consider only those papers that were before the trial court. The parties cannot add exhibits, depositions, or affidavits to support their position nor can they advance new theories or raise new issues in order to secure a reversal of the lower court's determination.

10 C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure*: Civil 2d §2716 at 650-54 (1983).

The only decision of this Court which Harrison contends is inconsistent with this abundance of authorities is *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868 (1976). Harrison's suggestion that the Fifth Circuit's refusal to consider evidence offered for the first time on appeal is inconsistent with *Singleton* is curious. This Court in *Singleton* specifically stated that the general rule is that a federal appellate court does *not* consider matters which were not presented to the district court. The opinion goes on to state: "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." 428 U.S. at 120-21, 96 S.Ct. at 2877.

Moreover, *Singleton* has no applicability to this case whatsoever. In that case, the plaintiffs filed an action challenging the constitutionality of a state statute. The district court dismissed the claim for lack of standing. The court of appeals not only reversed on the standing issue, but additionally reached the merits of the claim

and declared the statute to be unconstitutional. This Court reasoned that neither party had had an opportunity to offer evidence or argue the substantive merits of the case in the district court since the case was dismissed on procedural grounds at a preliminary stage in the litigation; therefore, the court of appeals had improperly ruled on the merits.

In short, Harrison's assertion that the Fifth Circuit's refusal to consider evidence not offered to the district court conflicts with decisions of this Court is spurious. Indeed, a rule which required courts of appeal to consider evidence not offered to the district court, as suggested by Harrison, would essentially give every losing party the opportunity to retry her case on appeal and would create endless litigation. Clearly, Harrison has failed to show special and important reasons for review of the decision in this case, and therefore, her petition should be denied.

CONCLUSION

In summary, there are simply no important unsettled legal issues present in this case. The district court granted Dow's motions for summary judgment consistent with the clear standards set forth by this Court. Harrison filed no summary judgment evidence to rebut the proof offered by Dow which demonstrated she could not establish essential elements of her claims. Indeed, Harrison could not have credibly rebutted the evidence since it was based almost entirely upon her own admissions.

Moreover, her suggestion that the Fifth Circuit acted contrary to decisions of this Court and other courts of appeals is specious. The courts have uniformly held that in reviewing a grant of summary judgment, a court of appeals should look only at the evidence presented to the district court, and parties may not retry their cases in the court of appeals by offering additional evidence. Thus, Harrison's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Dow's Rule 29.1 Listing of Parent Company and Non-wholly Owned Subsidiaries

PARENT COMPANY

The Dow Chemical Company

DOMESTIC SUBSIDIARIES

Advanced Micro Devices, Inc.
Agri-Chem., Inc.
Agron Inc.
Airco Generon Systems LP
Alamo Land Company, Inc.
Astropower, Inc.
Bear Mountain CoGen, Inc.
Biotechnology Research and Development Corporation
Blue Ridge Laboratories, Inc.
Brea Canyon CoGen, Inc.
BCC CoGen, Inc.
Cetus Corporation
Chalk Cliff CoGen, Inc.
Clean Bay
Coalition Technologies, Ltd.
Collaborative Research, Inc.
Columbia Scientific Industries Corporation
Conklin IPP, Inc.
Corona Energy Corporation
CoGen Admin Services, Inc.
CoGen Kern Bluff, Inc.
CoGen Lime Rock
CoGen Lynchburg, Inc.
CoGen Lyondeil, Inc.
CoGen Poso Creek, Inc.
CoGen Power, Inc.
CoGen Terrace Bay, Inc.
CC CoGen, Inc.
CEC Prime, Inc.
Destec – Sterling, Inc.

Destec Energy, Inc.
Destec Engineering, Inc.
Destec Fuel Resources, Inc.
Destec Holdings, Inc.
Destec Operating Company
Destec Ventures, Inc.
Dexco Polymers
Dionex Corporation
Dolco Packaging Corp.
Double "C" CoGen, Inc.
Dow Corning (Korea) Ltd.
Dow Corning (UK) Management Ltd.
Dow Corning Africa Silicones Inc.
Dow Corning Corporation
Dow Corning Enterprises, Inc.
Dow Corning Foundation
Dow Corning International Sales Corporation
Dow Corning Opthamalmics, Inc.
Dow Corning Silicon Energy Systems, Inc.
Dow Corning STI, Inc.
Dow Corning Wright Corporation
Dow-United Technologies Composite Products Inc.
Dowell Schlumberger Incorporated
DowElanco
DowElanco China Ltd.
DowElanco International Ltd.
DCS Capital Corporation
DCS Capital Partnership
DCU/LB Trust
DH Compounding Company
El Dorado Terminals Company
Flura Corporation
Generon Systems
Genetics Institute Inc. (GENI)
Hemlock Semiconductor Corp.
HEP CoGen, Inc.
Indian Hills Development Corp. of Carroll County

Industrial Training Systems Corporation
IGENE Biotechnology, Inc.
Joliet Marine Terminal Trust Estate
Kern Front CoGen, Inc.
Lakeside Laboratories, Inc.
Lime Rock Energy, Inc.
Louisiana Gasification Technology, Inc.
Magma Power Company
Marion & Company
Marion Merrell Dow Inc.
Marisub II, Inc.
Marisub, Inc.
Merrell Dow Pharmaceuticals Inc.
Merrell Dow Pharmaceuticals International Inc.
Neoprobe Corporation
Northway CoGen Inc.
NKY Distribution Center Inc.
NPC Services, Inc.
Oasis Pipeline Company
Oyster Creek CoGen, Inc.
OCG CoGen, Inc.
Polylactane Incorporated
Promix System
Prosperity IPP, Inc.
Prosperity Limited Partnership
Recon Associates, Inc.
Rio Grande CoGen, Inc.
San Joaquin CoGen, Inc.
Sierra CoGen, Inc.
Site Services, Inc.
Store Heat and Produce Energy, Inc.
SDC Coatings, Inc.
SJC CoGen, Inc.
Tanabe-Marion Laboratories (PENDING)
The Cynara Company
The Edgar Lomax Company
Thixomat, Inc.

United AgriSeeds, Inc.
Univar Corporation
Wickhen Products of Delaware, Inc.
Wickhen Products Inc.

FOREIGN SUBSIDIARIES

A.C.E. Insurance Co. (Bermuda) Ltd.
A.C.E. Insurance Company, Ltd.
Aardvark Limited
Ace Limited
Agro Quimica Maringa S.A.
Aguas Industriales de Tarragona S.A.
Anticorrosivos Industriales Limitada
Arabian Chemical Company Limited
ASIPLA (Asociacion Gremial de Industriales del Plastico de Chile)
AVR Chemie B.V.
AVR Chemie CV
Badder Limited
Bank Mendes Gans N.Y.
Biochimica Del Saiento S.P.A.
Bioresin Developments Ltd.
Blackhorse CoGen, Inc.
Borsele Hydrocracker B.V.
Canary Moving Limited
Carleton Shipping and Leasing Corporation
Carleton Shipping and Leasing Limited
Chalhoub-Pharmaceuticals Cha-Pha S.A.L.
Chimtrade
Compagnie des Services Dowell Schliumberger S.A.
Cranley Corporation Limited
Cromarty Petroleum Company Limited
CIA. Peruana De Telefonos S.A.
Dartique Limited
Destec Energy Canada, Inc.
Devonshire Underwiters Limited
Donichem Chemical KFT

Dow Chemical Iberica S.A.
Dow Corning (Thialand) Ltd.
Dow Corning de Argentina S.A.I.C.
Dow Corning de Columbia, S.A. (Siliconas de Columbia Limitada)
Dow Corning de Mexico S.A. de C.V.
Dow Corning de Venezuela S.A.
Dow Corning do Brasil Ltda.
Dow Corning Australia Pty. Ltd.
Dow Corning Canada, Inc.
Dow Corning Construction S.A.
Dow Corning Coordination Center S.A.
Dow Corning Foreign Sales Corporation, Inc.
Dow Corning France S.A.
Dow Corning GmbH
Dow Corning GmbH (Austria)
Dow Corning Hansil Limited
Dow Corning Hong Kong Limited
Dow Corning Iberica S.A.
Dow Corning Investment S.A.
Dow Corning Japan Ltd.
Dow Corning KK
Dow Corning Limited
Dow Corning New Zealand Ltd.
Dow Corning S.p.A.
Dow Corning S.A.
Dow Corning STI Limited
Dow Corning Taiwan, Inc.
Dow Corning Toray Silicone Co., Ltd.
Dow Kakoh Kabushiki Kaisha
Dow Mitsubishi Kasei Limited
Dowell Schlumberger (Asia) Limited
Dowell Schlumberger (Eastern), Inc.
Dowell Schlumberger (Far East), Inc.
Dowell Schlumberger (Malaysia) Sdn. Bhd.
Dowell Schlumberger (Middle East), Inc.
Dowell Schlumberger (Nigeria) Limited

Dowell Schlumberger (Western) S.A.
Dowell Schlumberger de Chile Limitada
Dowell Schlumberger de Mexico, S.A. de C.V.
Dowell Schlumberger de Venezuela, S.A.
Dowell Schlumberger do Brasil Servicos Patroliferos Ltda.
Dowell Schlumberger Argentina Sociedad Anonima de Mineria
Dowell Schlumberger Canada Inc.
Dowell Schlumberger China, Inc.
Dowell Schlumberger Corporation
Dowell Schlumberger International, Inc.
Dowell Schlumberger Italia S.A.
Dowell Schlumberger Participation
Dowell Schlumberger Peru, S.A.
Dowell Schlumberger Saudi Arabia Ltd.
Dowell Schlumberger Statistics Limited
DowElanco (Malaysia) Sdn Bhd
DowElanco (NZ) Limited
DowElanco (Singapore) Pte. Ltd.
DowElanco (Thailand) Limited
DowElanco de Colombia S.A.
DowElanco Argentina S.A.
DowElanco Australia Limited
DowElanco B.V.
DowElanco Canada Inc.
DowElanco Chile S.A.
DowElanco Danmark A/S
DowElanco Export S.A.
DowElanco GmbH
DowElanco Iberica S.A.
DowElanco Industrial Ltda.
DowElanco Italia S.r.L.
DowElanco Japan Limited
DowElanco Limited
DowElanco Mexicana, S.A. de C.V.
DowElanco Pacific Limited

DowElanco Pflanzenschutzmittel Vertriebsg.m.b.H.
DowElanco S.A.
DowElanco Sverige AB
DowElanco Taiwan Ltd.
DowElanco Tarim A.S.
DowElanco Venezuela, C.A.
Drilling Services S.A.
DC STI S.A.
DS Technical Services, Inc.
Eagle Flying Limited
Elanco Ihara K.K.
Epoxital S.R.L.
Estireno del Zulia, C.A.
Etoxilados del Plata S.A.
Etudes Et Fabrication Dowell Schlumberger
Eurosemences, S.A.
Exel Limited
Expansao Corretora de Seguros Ltda. S/C
EDN – Estireno do Nordeste S.A.
Family Comercio e Industria de Produtos de Limpeza Ltda
First Chemical Factoring SpA
Fort Saskatchewan Ethylene Storage Corporation
Fort Saskatchewan Ethylene Storage Limited Partnership
Fuji Polymer Industries Co., Ltd.
Generon Systems A.G.
Gestion de Capital Riesgo del Pais Vasco S.A.
Gruppo Lepetit S.p.A.
Gruppo Lepetit Trading SRL
Gurit Essex AG
GIE Euromais
H-D Tech Inc.
Haeger & Kaessner do Brasil Produtos Quimicos Ltda.
Hammer Pharma S.p.A.
Hartel Diensten B.V.
I.N.C.S.I., S.A.
Ibachem (Ibafon Chemicals) Limited

International Chemical and Mining Corporation
International Oilfield Contractors, Inc.
ICAP – Industria Chemica S.R.L.
J.C.P. Laboratories Inc.
Kukje Pharmaceutical Industrial Company Ltd.
Laboratories Pharmaceutiques Biotec Maroc S.A.R.L.
Lucky Epoxy Limited
Lucky Epoxy Resin Ltd. (PENDING)
Lucky-DC Silicone Co., Ltd.
Maasviakte Oil Terminal C.V.
Maasviakte Oil Terminal N.V.
Marion Merrell Dow (Europe) A.G.
Marion Merrell Dow (N.Z.) Limited
Marion Merrell Dow Australia Pty. Limited
Marion Merrell Dow K.K.
Marion Merrell Dow S.A.
Merrell Dow Belgium S.A.
Merrell Dow Espana S.A.
Merrell Dow France et Cie (SNC)
Merrell Dow Funai K.K.
Merrell Dow Manufacturing Limited
Merrell Dow Pharma GmbH
Merrell Dow Pharmaceuticals (Canada) Inc.
Merrell Dow Pharmaceuticals Limited
Merrell Dow Pharmaceuticals Pacific Limited
Merrell Dow Portuguesa Sociedade Quimica, S.A.
Merrell Puerto Rico, Inc.
MDP (Holdings) Limited
N.V. Dow Corning S.A.
Niedersachsische Geselischaft zur Endabiagerung von Sonderabfail mbH
Nordic Laboratories Inc. (PENDING)
NBW Industria E. Commercio Limitada
Oilfield International Equipment and Supplies, Inc.
Oilfield International Equipment and Supplies, Pte. Ltd
P.T. Dowell Schlumberger Indonesia
P.T. Pacific Chemicals Indonesia

P.T. Pacific Indomas Plastic Indonesia
Pacific Chemicals Berhad
Pacific Plastics (Thailand) Limited
Perennator GmbH
Petroquimica-Dow S.A. (Petrodow)
Polykem S.A.
Pumping Services of Iran Private Joint Stock Company
Pumptech N.V.
PACLAN FB Haushaitsartikel Vertriebs GmbH
S.A. Interentreprise Les Boulitides
Scotdril Offshore Company
Services Conseils Dowell Schlumberger S.A.
Siam Styrene Monomer Company Limited
Siam Synthetic Latex Company Limited
Silcover SpA
Siliconas de Chile Limitada
Siliconas Del Peru S.A.
Silinor S.A.
Siltech Limited
Suministradora de Productos Quimicos, S.A.
Sumitomo Naugatuck Co., Ltd.
SD Group Service Company Limited
Technical Consultants, Inc.
Total Opslag en Pijpieiding Nederland N.V.
Tower Assurance Company Limited
Transformadora De Etileno S.A.
TOTAL Raffinaderij Nederland N.V.
Ulsan Pacific Chemical Corporation
Vorakim Kimya Sanayi Ve Ticaret Anonim Sirketi
Wabiskaw Explorations Ltd.
Wm. H. Muller S.A. – Minerios, Comerico e Navegacao
X. L. Insurance Company, Ltd.
Zhejlang Pacific Chemical Corporation
Zoo-Agro de Venezuela, C.A.

APPENDIX B

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

LILLIE A. HARRISON	*	CIVIL ACTION
VERSUS	*	NO. 89-711-B
	*	JUDGE POLOZOLA
DOW CHEMICAL COMPANY	*	MAGISTRATE RIEDLINGER

STATEMENT OF UNDISPUTED FACTS

Pursuant to Rule 2.09 of the Uniform Local Rules and in connection with its Motion for Partial Summary Judgment and to Dismiss Plaintiff's Pendent State Claim and Claim for Compensatory Damages, Defendant contends that the following facts are undisputed:

1. Plaintiff filed her complaint in this action on September 21, 1989.

2. Plaintiff became aware of the facts upon which she bases her claim of intentional infliction of emotional distress in March 1988. (Pl. Depo. 194-96)

3. Plaintiff filed a formal charge of discrimination with the Equal Employment Opportunity Commission on July 14, 1988. (Pl. Depo. 201; Depo. Exh. 15)

4. Plaintiff has been employed by Dow since 1971, and Dow has given her pay increases, promotions, satisfactory performance appraisals and even paid for her to pursue her college degree. (Pl. Depo. 57, 210-11)

5. Plaintiff has never been threatened with termination, put on probation, or disciplined in any manner by Dow. (Pl. Depo. 210-11)

Respectfully submitted,

PHELPS, DUNBAR, MARKS,
CLAVERIE & SIMS

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ATTORNEYS FOR DEFENDANT
DOW CHEMICAL COMPANY

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for Plaintiff by mailing same by first class United States mail, properly addressed and postage prepaid on this 22nd day of August, 1990.

/s/ Thomas H. Kiggans
THOMAS H. KIGGANS

APPENDIX C

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

LILLIE A. HARRISON	*	CIVIL ACTION
VERSUS	*	NO. 89-711-B
	*	JUDGE POLOZOLA
DOW CHEMICAL COMPANY	*	MAGISTRATE RIEDLINGER

STATEMENT OF MATERIAL FACTS AS TO WHICH DOW CHEMICAL COMPANY CONTENDS THERE IS NO GENUINE ISSUE TO BE TRIED

Pursuant to Rule 2.09 of the Uniform Local Rules and in connection with its Motion for Summary Judgment, Defendant contends that the following are material facts as to which there is no genuine issue to be tried:

1. Plaintiff was hired by Dow as a clerk typist in 1971. (Depo. at 68)

2. Plaintiff has received a number of promotions, and is currently employed by Dow as a senior secretary. (Depo. at 135-36)

3. Plaintiff has always received cash awards given to employees who are not marginal workers. (Depo. 161-63)

4. Plaintiff has consistently been given fully satisfactory performance appraisals and has received numerous pay increases. (Depo. 175, 210)

5. Dow has paid for Plaintiff to pursue her college degree. (Depo. 210)

6. Plaintiff has never been threatened with termination, put on probation, or disciplined in any manner by Dow. (Depo. 210-11)

7. Plaintiff filed a formal charge of discrimination with the Equal Employment Opportunity Commission (EEOC) on July 14, 1988. (Depo. 201; Depo. Exh. 15)

8. Plaintiff's claims that she was unlawfully denied promotions to the positions of Senior Stenographer in Promix Accounting, Secretary in (BIS) Computer Services, Administrative Secretary in the Traffic Department, Senior Secretary in the Personnel Human Resources Department, and the newly created Aviation Department job, all arose more than 180 days before she filed her EEOC charge. (Plaintiff's Answers to Interrogatory No. 4(a))

9. Plaintiff's claim that she was unlawfully denied a computer training course in 1986 arose more than 180 days before she filed her EEOC charge. (Plaintiff's Answer to Interrogatory No. 11)

10. Dwayne Smartt was assigned to a shipping coordinator job in March 1988 pursuant to Dow's Materials Management Development Program. Plaintiff was not eligible for this program because she does not have a college degree. (Depo. 150, 153-54)

11. Nolan Blanchard was transferred to a shipping coordinator job in 1988 through a lateral transfer, not a promotion. Blanchard had been working in a special assignment which was coming to an end, and Dow simply reassigned him to this job. This was a lateral transfer, and Dow was not seeking applicants from current employees to be promoted to this job. (Latimer Affidavit)

12. Plaintiff is unaware of the qualifications or experience of Smartt and Blanchard, and has no idea as to why they were assigned shipping coordinator jobs in 1988. (Depo. 146-47)

13. Dow promoted both black and white employees from nonexempt hourly jobs to exempt salaried jobs. (Depo. 145-46)

14. For Plaintiff to have been promoted to a shipping coordinator job in 1988 would have resulted in a substantial increase in salary, and Plaintiff is aware of no employee at Dow who has received a promotion of that magnitude in one promotional step. (Depo. 157-58)

15. Plaintiff and Beulah Butler, the two black clerical employees in the Distribution and Traffice [sic] Department in June 1988, are paid more money than Carolyn Bordelon, the white clerical employee in that department. The two black employees are also higher in their salary ranges than the white employee. (Depo. 171-73)

16. Beulah Butler, a black employee, has consistently received higher merit increases and bonuses than both Plaintiff and Bordelon. (Depo. 169)

17. Both black and white employees have received better bonuses and pay increases than Plaintiff. (Depo. 164-66)

18. In 1987, Beulah Butler, a black employee was assessed as having potential for ultimately becoming an executive secretary for Dow, the same as Bridgett Carrier, a white employee, and

higher than Carolyn Bordelon, another white employee. (Depo. 188; Depo. Exh. 4)

Respectfully submitted,

PHELPS, DUNBAR, MARKS,
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ATTORNEYS FOR DEFENDANT
DOW CHEMICAL COMPANY

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for Plaintiff by mailing same first class United States mail, properly addressed and postage prepaid on this 12th day of September, 1990.

/s/ Thomas H. Kiggans
THOMAS H. KIGGANS

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

LILLIE A. HARRISON

VERSUS CIVIL ACTION

DOW CHEMICAL COMPANY NO. 89-711-B

MAGISTRATE'S REPORT

This matter is before the court on a motion for summary judgment filed by the defendant, Dow Chemical Company (Dow). Plaintiff received both a written and oral extension to file a memorandum in opposition to this motion. The written extension expired on October 26, 1990 and as of this date no opposition has been filed, therefore this motion is unopposed.

Plaintiff, Lillie A. Harrison, was hired by Dow as a clerk typist in 1971. She filed this action pursuant to Title VII of the Civil Rights Act, 42 U.S.C. §2000e, et seq., alleging that she was denied promotions and received smaller merit pay increases because of her race, black. Plaintiff also alleged a pendent state law claim for intentional infliction of mental distress and claimed compensatory damages. In an opinion dated November 21, 1990, however, the district court approved the magistrate's recommendation of October 15, 1990 and granted Dow's motion for partial summary judgment, dismissing the plaintiff's state law claim and claim for compensatory dāmages. Plaintiff's remaining Title VII claim is the subject of this motion.

Applicable Law

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. When the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552-55 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2502, 2502-12 (1986). Once the party seeking summary judgment has informed the district court of the basis for its motion and identified those portions of the record which it believes demonstrates the absence of a genuine issue of material fact, the burden shifts to the non-mover to make a showing sufficient to establish the existence of a genuine dispute regarding element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex*, 106 S.Ct. at 2553. In order to meet this burden, the party opposing the motion "may not sit on its hands, complacently relying"[1] on the pleadings. The non-moving party must designate specific evidence in the record of sufficient caliber and quantity to create a genuine issue for trial such that a rational finder of fact could return a verdict in his favor. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356 (1986); *Anderson*, 106 S.Ct. at 2513; *Phillips Oil Company v. OKC Corporation*, 812 F.2d 265 (5th Cir. 1987).

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[1] *Weyant v. Acceptance Ins. Co.*, 1990 U.S. App. Lexis 20118 (5th Cir. 1990).

With regard to materiality, only those disputes over facts that might affect the outcome of the lawsuit under the governing substantive law will preclude summary judgment. The governing substantive law to be applied in this case is Title VII, 42 U.S.C. §2000e. To prove an employment discrimination claim based on a theory of disparate treatment, the plaintiff in this case was required to show that: (1) she was a member of a protected class; (2) she applied for a promotion to an available position for which she was qualified; (3) that she did not receive the promotion and the position was filled with an employee from outside the protected class. *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 1824 (1973). If the plaintiff establishes a prima facie case, a rebuttable presumption arises that the employer unlawfully discriminated against the plaintiff. The burden of production then shifts to the employer who must articulate a legitimate, nondiscriminatory reason for the employment decision. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 1093 (1981). The presumption of discrimination disappears if the employer satisfies this burden of production. *McDaniel v. Temple Independent School District*, 770 F.2d 1340, 1346 (5th Cir. 1985). Then the plaintiff must prove by a preponderance of the evidence that the reason articulated by the employer was merely a pretext and not the true reason for the discharge.

Analysis

Defendant asserted that summary judgment is appropriate on several grounds. Defendant argued that most of the plaintiff's claims of discrimination were untimely

because plaintiff failed to file a charge of discrimination within 180 days after the alleged discriminatory acts occurred. Defendant also argued that the plaintiff has presented no evidence to establish a prima facie case, or in the alternative, to sustain her burden of proving that Dow's reasons for its employment decisions were a pretext for unlawful race discrimination. Defendant identified portions of the record to demonstrate the absence of a genuine issue for trial on the Title VII claim.

In support of its prescription argument defendant pointed to the plaintiff's answers to interrogatory numbers 4 and 11 and her deposition testimony. Interrogatory number 4 showed that the plaintiff believed she was discriminated against in eight promotion decisions and all but two of them occurred before March of 1988. Interrogatory number 11 showed that the plaintiff's claims of racial discrimination in denying her job training occurred in 1986. Plaintiff's deposition testimony and the EEOC charge established that the plaintiff's charge was filed on July 14, 1988.[2] Thus, accepting as true the

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[2] Title 42 U.S.C. §2000e-5 (e), provides in pertinent part that a charge under Title VII "shall be filed one hundred and eighty days after the alleged unlawful employment practice occurred." This period begins to run from the time the plaintiff knows or reasonably should know that the challenged discriminatory acts have occurred. *McWilliams v. Escambia County School Board*, 658 F.2d 326, 328 (5th Cir. 1981). However, a filing of a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but like a statute of limitation, is subject to waiver, estoppel and equitable tolling. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127 (1982).

plaintiff's responses to these interrogatories, all the employment decisions complained of which occurred prior to March, 1988 were untimely. Plaintiff did not come forward and designate any facts in the record to show that there was a genuine issue of material fact as to whether these claims were timely or that in this case the 180 day period was subject to equitable tolling.

Defendant argued as to the two remaining promotional decisions that the plaintiff failed to establish a prima facie case. Moreover, defendant contended that the plaintiff had no evidence to dispute Dow's legitimate discriminatory [sic] reasons for its decisions. In regard to the alleged promotional opportunities for shipping coordinator, defendant submitted the affidavit of Richard Latimer, manager of the Traffic and Distribution Department. He was involved in the decisions to place Dwayne Smartt and Nolan Blanchard in shipping coordinator positions. Latimer attested to the fact that the position filled by Smartt was not a posted job open for application by current employees, and that the job was only filled by college graduates for the purpose of allowing them to acquire experience in all areas. Latimer also stated that the transfer of Blanchard to another shipping coordinator job in 1988 was a lateral transfer. It occurred because Blanchard's special assignment in another department was coming to an end and Dow needed to place him in another position. This affidavit and the plaintiff's deposition[3] testimony established that these were not posted positions for which the plaintiff was

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[3] Plaintiff's deposition pages 150, 153-4.

qualified and for which Dow sought applications from current employees. Furthermore, this evidence showed that Dow had legitimate non-discriminatory reasons for these two employment decisions.

Plaintiff also alleged that Dow discriminated against her in pay increases and salary level. In response to the defendant's interrogatory requesting the plaintiff state the factual basis for this allegation, the plaintiff identified Carolyn Bordelon as a white employee who received higher pay raises and bonuses than she received. Defendant pointed to Exhibit A attached to the plaintiff's interrogatory answers which showed that Bordelon was the lowest paid clerical employee in the lowest salary range. Plaintiff also admitted in her deposition that both black and white employees received better bonuses and pay increases than she received. Plaintiff's deposition pp. 164-171. In regard to the plaintiff's claims that Dow unlawfully prohibited the advancement of black employees, defendant submitted job appraisals of several employees. *See* deposition exhibit 4. These performance appraisals showed that two white clerical employees were assessed as having higher promotional potential than the plaintiff. However, a black employee was evaluated with a potential equal or higher than these two white employees. Plaintiff also testified in her deposition that she was aware of black employees who were promoted from nonexempt hourly jobs to salaried positions. Plaintiff's deposition, pp. 144-46.

In response to Dow's legitimate nondiscriminatory reasons for the salary and promotional decisions plaintiff failed to come forward with any evidence in opposition to create a genuine factual dispute for trial. In this case

defendant adequately identified those portions of the record which demonstrated the absence of a genuine issue of material fact. Plaintiff has simply failed to come forward with any evidence from which a rational trier of fact could find that the defendant's employment decisions at issue were challenged timely or motivated by race. These are essential elements of plaintiff's Title VII claim. If the party with the burden of proof cannot produce any summary judgment evidence on the essential element of her claim, summary judgment is required. *Geiserman v. MacDonald*, 893 F.2d 787, 793 (5th Cir. 1990).

RECOMMENDATION

It is the recommendation of the magistrate that the motion for summary judgment by defendant, Dow Chemical Corporation be granted and this action be dismissed.

Baton Rouge, Louisiana, November 30, 1990.

/s/ Stephen C. Riedlinger
UNITED STATES MAGISTRATE

APPENDIX E

UNITED STATED DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

LILLIE A. HARRISON

VERSUS CIVIL ACTION

DOW CHEMICAL COMPANY NO. 89-711-B

OPINION

For reasons set forth in the Magistrate's Report to which no objection was filed:

IT IS ORDERED that the defendant's motion for partial summary judgment be GRANTED dismissing the plaintiff's pendent state claim and claim for compensatory damages.

Baton Rouge, Louisiana, November 21, 1990.

/s/ Frank J. Polozola
UNITED STATES
DISTRICT JUDGE